APPENDIX A

SUPREME COURT OF COLORADO
EN BANC

No. 01SC744

LAWRENCE S. ALLEN, M.D.; MICHAEL K. MILLER, M.D.; TIMOTHY R. COLLINS, M.D.; and COLORADO PERMANENTE MEDICAL GROUP, P.C.,
Petitioners,

v.

KAREN PACHECO,
Respondent.

June 9, 2003.
Rehearing Denied June 30, 2003.

Chief Justice MULLARKEY delivered the Opinion of the Court.

I. Introduction

In this wrongful death case, we address the question of whether the respondent Karen Pacheco is bound by an arbitration provision contained in her deceased husband's agreement with his health maintenance organization ("HMO"). The court of appeals held that Pacheco was not bound by the arbitration agreement because the agreement does not apply to wrongful death actions filed by a member's non-party spouse. *Pacheco v. Allen*, 55 P.3d 141, 143-44 (Colo.App.2001). We affirm the court of appeals on different grounds, holding that although the arbitration provision in the HMO contract does extend to wrongful death actions filed by a member's non-party spouse, Pacheco is not bound by the arbitration provision because it does not comply with the

Colorado Health Care Availability Act ("HCAA"), §§ 13-64-403(3) and (4), 5 C.R.S. (2002). The HCAA governs the arbitration provision in this case because the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1997), exempts sections 13-64-403(3) and (4) of the HCAA from federal preemption by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 (1999).

II. Facts and Procedural History

The Kaiser Foundation Health Plan of Colorado ("Kaiser") is an HMO that provides health care services and health care insurance to its enrollees. Pacheco's husband was a Kaiser member, but Pacheco herself never became a party to the Kaiser contract. The contract between Kaiser and Pacheco's husband contained an arbitration clause requiring "any claim of medical malpractice" to be submitted to binding arbitration. The clause included claims for "death" asserted by "a Member's heir or personal representative":

> Claims . . . *shall be submitted to binding arbitration if the claim is asserted: By a Member, or by a Member's heir or personal representative*, or by a person claiming that a duty to him or her arises from a Member's relationship with Health Plan, Hospitals or Medical Group incident to this Agreement . . . *For any reason, including, but not limited to, death . . . Against* one or more of the following: Health Plan, Hospitals, Medical Group, *Any Physician*, or Any employee or agent of the foregoing.

(emphasis added).

In 1997, Pacheco's husband died after extended hospitalization for pancreatitis. Pacheco subsequently filed a wrongful death action against Dr. Lawrence S. Allen, Dr. Timothy R. Collins, Dr. Michael K. Miller, and their employer, the Colorado Permanente Medical Group, P.C.

("CPMG") (collectively, "the providers").[1] CPMG is a professional medical corporation that contracts with Kaiser to provide medical services to Kaiser members.

The trial court concluded that the arbitration clause in the contract between Kaiser and Pacheco's husband was enforceable against Pacheco because a surviving spouse is an "heir" under the plain and ordinary meaning of the agreement. The trial court also concluded that the arbitration provision was enforceable even though the provision failed to comply with the Colorado HCAA, because the FAA federally preempted the statute. Pacheco's case was then sent to arbitration, where the arbiter entered an award in favor of the providers. The trial court subsequently denied Pacheco's motion to vacate the award and Pacheco appealed, arguing that the trial court erred by binding her to the arbitration agreement.

The court of appeals reversed, holding in a published opinion that the arbitration clause was not enforceable against Pacheco because (1) a contract cannot bind a non-party to an agreement; (2) Pacheco was not her husband's "heir"; (3) a wrongful death cause of action under the Colorado Wrongful Death Act, §§ 13-21-201 to 203.7, 5 C.R.S. (2002), is a wholly separate action not covered by the terms of the Kaiser agreement; and (4) generally, the broad language of the Kaiser agreement does not extend to non-party spouses bringing wrongful death claims. *Pacheco*, 55 P.3d at 143-44. In so holding, the court of appeals found it unnecessary to reach the issue of federal preemption.

We granted certiorari to determine whether Pacheco is bound by the arbitration clause[2] and now affirm the judgment

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[1] Pacheco's claims against the treating hospital and other physicians were ultimately dismissed.

[2] We granted certiorari on the following two issues:

1. Whether plaintiff wife is required to arbitrate her claim for the wrongful death of her husband, where her husband's agreement

of the court of appeals on different grounds. We hold that although the scope of the arbitration provision does include wrongful death actions filed by a member's non-party spouse, Pacheco nevertheless is not bound by the provision because the provision does not comply with the statutory requirements set forth in the Colorado HCAA. Sections 13-64-403(3) and (4) of the HCAA govern the arbitration provision in this case because the McCarran-Ferguson Act exempts these sections of the HCAA from federal preemption.

III. Analysis

1. The Arbitration Agreement Binds a Non-Party Spouse Asserting a Wrongful Death Claim

Before addressing the statutory preemption issues raised in this case, we first explain why the scope of the Kaiser arbitration provision includes wrongful death actions filed by a member's non-party spouse.

An arbitration agreement is a contract, the interpretation of which is a matter of law that we review de novo. *See State Farm Mut. Auto. Ins. Co. v. Stein*, 940 P.2d 384, 387 (Colo. 1997) (addressing insurance policies generally). To determine whether the parties have agreed to submit the issue in question to arbitration, we follow state law principles governing contract formation. *City & County of Denver v. Dist. Ct.*, 939 P.2d 1353, 1361 (Colo.1997). We must construe the terms of the agreement in a manner that allows

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with his health maintenance organization (HMO) includes a provision requiring the arbitration of all claims for medical malpractice, including claims for "death," and claims by a "Member's heir or personal representative," where plaintiff wife is not a party to the agreement.

2. Whether, notwithstanding the court of appeals' failure to reach this issue, the Federal Arbitration Act (FAA) preempts the restrictive provisions of § 13-64-403, 5 C.R.S. (2002), and requires enforcement of the arbitration provision.

each party to receive the benefit of the bargain, and the scope of the agreement must faithfully reflect the reasonable expectations of the parties. *Id.* at 1361, 1363. In other words, we must interpret the agreement in a manner that best effectuates the intent of the parties. *Id.* at 1361.

We ascertain the parties' intent by looking to the plain language of the agreement. *State Farm*, 940 P.2d at 387. We will enforce the agreement as written unless there is an ambiguity in the language; courts should neither rewrite the agreement nor limit its effect by a strained construction. *Id.* Thus, like any contract, an arbitration agreement must be given effect according to the plain and ordinary meaning of its terms. *Id.*

In determining whether an ambiguity exists, we must ask whether the disputed provision is reasonably susceptible on its face to more than one interpretation. *Id.* We also evaluate the agreement as a whole and construe the language in harmony with the plain and generally accepted meaning of the words employed, unless the intent of the parties, as expressed in the contract, indicates that an alternative interpretation is intended. *Id.*

If ambiguities are found in the arbitration agreement, we must afford the parties a presumption in favor of arbitration and resolve doubts about the scope of the arbitration clause in favor of arbitration.[3] *See City & County of Denver*, 939 P.2d at 1364. More specifically, we must compel arbitration unless we can say "with positive assurance" that the arbitration clause is not susceptible of any interpretation that

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[3] Although the court of appeals correctly stated that ambiguities in an insurance contract generally are construed against the drafter, *see Pacheco*, 55 P.3d at 144 (citing *State Farm*, 940 P.2d at 390), the court of appeals failed to recognize this court's clear holding in *City & County of Denver*, 939 P.2d at 1364, that courts must afford ambiguities in arbitration agreements a presumption in favor of arbitration.

encompasses the subject matter of the dispute. *Id.* (citations omitted). Moreover, a "broad or unrestricted" arbitration clause makes the strong presumption favoring arbitration apply with even greater force. *Id.* (citations omitted).

In short, as we examine whether Kaiser and Pacheco's husband, via the contract between them, intended the scope of the arbitration agreement to include both (1) wrongful death claims and (2) non-party spouses, we must look to the plain and ordinary meaning of the agreement itself and construe any ambiguities in favor of arbitration.

In applying the above legal guidelines to this case, we look first to the plain language of the arbitration agreement. The contract in this case states, in pertinent part:

> It is understood that *any claim of medical malpractice* including any claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered or omitted, *will be determined by submission to binding arbitration* . . . Claims . . . *shall be submitted to binding arbitration if the claim is asserted: By a Member, or by a Member's heir or personal representative*, or by a person claiming that a duty to him or her arises from a Member's relationship with Health Plan, Hospitals or Medical Group incident to this Agreement . . . *For any reason, including, but not limited to, death*, mental disturbance, bodily injury or economic loss arising from the rendition or failure to render services . . . Against one or more of the following: Health Plan, Hospitals, Medical Group, Any Physician, or Any employee or agent of the foregoing.

(emphasis added).

In construing this agreement, the court of appeals concluded that the above provisions do not apply to wrongful death claims brought by non-party spouses such as Pacheco.

We disagree. In interpreting the words of the agreement in accord with their plain and ordinary meaning, we find that the agreement applies not only to (1) wrongful death claims as claims for "death," but also to (2) non-party spouses as "heirs."

First, the arbitration agreement plainly applies to "*any claim* of medical malpractice" and any claim brought "*[f]or any reason, including, but not limited to, death* . . . ." The plain and ordinary meaning of this wording reveals a clear intent to include wrongful death claims within the scope of claims that must be submitted to binding arbitration. Even if we were to characterize the provision as ambiguous due to the fact that the exact term "wrongful death" is not used in the agreement, the language of the agreement as a whole is very broad. Because the presumption in favor of arbitration is strongest where the language of the agreement is "broad or unrestricted," *City & County of Denver*, 939 P.2d at 1364, the arbitration provision in this case is best construed as one that includes wrongful death claims.

Despite the contract's highly inclusive reference to claims brought "*[f]or any reason, including, but not limited to, death*," the court of appeals held that wrongful death claims are not covered by the terms of the agreement because under the Colorado Wrongful Death Act, §§ 13-21-201 to 203.7, 5 C.R.S. (2002), a wrongful death cause of action "is wholly separate and distinct from any action [Pacheco's] husband might have maintained." *Pacheco*, 55 P.3d at 143 (citing *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949); *Rowell v. Clifford*, 976 P.2d 363 (Colo.App.1998)). Although it is true that a wrongful death claim is separate and distinct from a cause of action the deceased could have maintained had he survived, this observation is not helpful in determining whether separate wrongful death claims are in fact included within the plain and ordinary meaning of the agreement. Because the plain language of the agreement in this case

refers to "all claims" including those brought for "death," and because we must apply a strong presumption in favor of arbitration, we find that the arbitration agreement applies to wrongful death claims.

Having established that the scope of the agreement includes wrongful death actions, we now determine whether the scope of the agreement also includes non-party spouses. We hold that the arbitration agreement does apply to non-party spouses because (a) a non-party may be bound by the terms of an agreement if the parties so intend and because (b) a spouse is an "heir" under the meaning of the agreement.

The court of appeals reasoned that the arbitration clause does not apply to a non-party such as Pacheco because a non-party to a contractual agreement cannot be bound by its terms. *Pacheco*, 55 P.3d at 143. This statement of the law is inaccurate. Although it is true that in general, only the parties to a contract are bound by its terms, a non-party may fall within the scope of the agreement if the parties so intend. *Jefferson County Sch. Dist. No. R-1 v. Shorey*, 826 P.2d 830, 843 (Colo.1992); *Parker v. Ctr. For Creative Leadership*, 15 P.3d 297, 298 (Colo.App.2000); *Everett v. Dickinson & Co., Inc.*, 929 P.2d 10, 12 (Colo.App.1996); *Eychner v. Van Vleet*, 870 P.2d 486, 489 (Colo.App.1993).[4]

In this case, the arbitration agreement binds not only claims brought by signatory members, but also claims brought by a member's "heir or personal representative, or by a person

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[4] In *City & County of Denver*, 939 P.2d at 1370, this court stated generally that "[a] non-party to an agreement containing an ADR clause may not be compelled to use the ADR procedures." *City & County of Denver* did not, however, involve an ADR provision specifically addressing non-parties. *See id.* at 1359. Here, in contrast, we construe an arbitration provision expressly purporting to bind not only the signatory, but also certain non-parties who are in privity with the signatory, namely an "heir or personal representative or . . . a person claiming that a duty to him or her arises from a Member's relationship with [Kaiser]."

claiming that a duty to him or her arises from a Member's relationship with [Kaiser] incident to this Agreement." The contract clearly does not require that these heirs, personal representatives, or persons claiming special duties actually sign and become parties to the contract before they can fall within the scope of the arbitration agreement. Because the contract reflects the intent of the parties to bind claimants other than signatory members, the fact that Pacheco is a non-party does not by itself exempt her from the arbitration agreement. So long as she is within the category of heirs, personal representatives, or persons claiming special duties, she is bound by the arbitration agreement.

In this case, Pacheco is her husband's "heir" under the meaning of the agreement. To reach this conclusion, we follow the same legal analysis used above: we look first to the plain and ordinary meaning of the agreement and then construe any ambiguities in favor of arbitration. Here, the term "heir" as used in the arbitration agreement is ambiguous because the term may or may not include spouses[5]—as we explain below, the term is reasonably susceptible on its face to more than one interpretation. *See State Farm,* 940 P.2d at 387.

On one hand, it is well-established that the definition of "heirs" as used in the Colorado Wrongful Death Act, §§ 13-21-201 to 204, 5 C.R.S. (2002) does not include spouses.[6]

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[5] The trial court did not find ambiguity, stating, "interpreting the words of the agreement in accord with their plain and ordinary meaning mandates that the word 'heir' be read to include a surviving spouse."

[6] As used in the Wrongful Death Act, section 13-21-201(1), 5 C.R.S. (2002), the term "heirs" designates which class of persons may file a wrongful death claim if the spouse has not already filed a claim within one year of the decedent's death:

> (a) In the first year after such death: (I) By the spouse of the deceased;
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> (II) Upon the written election of the spouse, by the spouse and the heir or heirs of the deceased;

See, e.g., Hindry v. Holt, 24 Colo. 464, 468, 51 P. 1002, 1004 (1897); *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129, 1131 (Colo.App.1997) (the term "heirs" under the Wrongful Death Act refers only to lineal descendants of the deceased). The court of appeals in this case relied on the Wrongful Death Act's definition of "heirs" when it refused to characterize Pacheco as an "heir" under the meaning of the arbitration agreement. *Pacheco*, 55 P.3d at 143.

On the other hand, some Colorado cases have generally referred to spouses as "heirs." *See, e.g., Binkley v. Switzer*, 75 Colo. 1, 3, 223 P. 757, 758 (1923) (stating that a decedent left "his widow as his heir"); *Tanski v. Tanski*, 820 P.2d 1143, 1144 (Colo.App.1991) (referring to a surviving spouse as an "heir at law"); *Clint v. Stolworthy*, 144 Colo. 597, 600, 357 P.2d 649, 651 (1960) (referring to "heirs other than the widow"). Moreover, the commonly understood notion of the term "heir" is very broad, loosely defined as "a person who inherits real or personal property." Black's Law Dictionary 727 (7th ed.1999). Also, the arbitration agreement here is not limited to wrongful death claims—the agreement requires "all claims" to be submitted to binding arbitration. Therefore, there is no automatic connection between the definition of "heirs" as used in the Wrongful Death Act and the definition of "heir" as used in this agreement. Thus, we may reasonably interpret the term "heir" as a term that includes spouses.

As with any ambiguity in an arbitration agreement, we must resolve doubts about the scope of the arbitration agreement in favor of arbitration. *City & County of Denver*, 939 P.2d at 1364. We must compel arbitration unless we can say "with positive assurance" that the arbitration clause is not susceptible of any interpretation that encompasses the subject

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(III) Upon the written election of the spouse, by the heir or heirs of the deceased; or

(IV) If there is no spouse, by the heir or heirs of the deceased.

matter of the dispute. *See id.* Because the term "heir" as used in the arbitration agreement is ambiguous and is susceptible of an interpretation that encompasses spouses, we construe the term inclusively and hold that spouses are within the scope of the agreement.

Our inclusive interpretation not only adheres to the presumption in favor of arbitration, but also avoids an absurd result. In this case, an exclusion of spouses from the term "heirs" would run counter to the arbitration agreement's otherwise broad terms. If spouses are not "heirs," a member's husband or wife would not need to arbitrate any claims whatsoever, let alone claims asserting wrongful death. Meanwhile, the member, the member's children, the member's personal representative, and any person claiming a special duty must still arbitrate "all claims" brought "[f]or any reason." Given the broad terms of the arbitration agreement, we find it highly unlikely that the parties intended to exclude spouses in such a sweeping manner.

In sum, we reject the court of appeals' analysis and agree with the trial court that the arbitration agreement applies to both (1) wrongful death actions and (2) non-party spouses. Nevertheless, we affirm the court of appeals' holding that the arbitration agreement is unenforceable against Pacheco, because the agreement does not comply with the requirements set forth in the Colorado HCAA.

2. The McCarran-Ferguson Act Exempts the Colorado HCAA from Federal Preemption by the FAA

The parties do not dispute that the arbitration agreement in this case does not comply with the regulations set forth in the Colorado HCAA, or Health Care Availability Act. Sections 13-64-403(3) and (4) of the HCAA mandate specific language and typeface requirements for arbitration provisions contained in medical services agreements. The General Assembly enacted these regulations with the express intent

"that an arbitration agreement be a voluntary agreement between a patient and a health care provider." § 13-64-403(1), 5 C.R.S. (2002). In this case, the arbitration agreement between Kaiser and Pacheco's husband lacks the language and bold-faced type notice required by the HCAA. Normally, this non-compliance alone would render the agreement unenforceable against Pacheco.

Here, however, the parties have raised the issue of whether the HCAA is federally preempted by the FAA, or Federal Arbitration Act. The FAA upholds the validity of arbitration agreements contained in any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. If the FAA preempts the HCAA, the HCAA will not govern the arbitration agreement and the agreement is enforceable against Pacheco. If the HCAA is not preempted, Kaiser's non-compliance with the HCAA is fatal and Pacheco is not bound by the agreement.

Typically, when a state enacts arbitration statutes of general applicability and the statute is inconsonant with the FAA, the FAA preempts that state law. *See, e.g., Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687-88, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1360 (10th Cir.1971) (finding preemption where the arbitration statute was one of general application); *Hamilton Life Ins. Co. of N.Y. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (2d Cir.1969) (finding preemption where the arbitration statute applied generally to all contracts). The Colorado HCAA is not a statute of general applicability because it targets only arbitration agreements contained in medical services contracts. Its detailed arbitration regulations clearly conflict with the FAA, which broadly states that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2. The Federal District Court for the District of Colorado has

held that because sections 13-64-403(3) and (4) of the HCAA and the FAA are "inconsonant," the state regulations are preempted. *Morrison v. Colo. Permanente Med. Group*, 983 F.Supp. 937, 943 (D.Colo.1997).

Our preemption analysis, however, does not end here. A critical issue not addressed in *Morrison* but raised by Pacheco in this case is the question of whether the McCarran-Ferguson Act "reverse-preempts" the FAA preemption of the HCAA arbitration regulations. The McCarran-Ferguson Act provides, in relevant part:

> *No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance* . . . unless such Act specifically relates to the business of insurance. *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012(b) (emphasis added).

In other words, under the first clause of section 1012(b), the McCarran-Ferguson Act exempts a state statute from federal preemption if the state law is enacted "for the purpose of regulating the business of insurance" and if the federal statute does not specifically "relate to the business of insurance." It is undisputed here that the FAA does not relate to the business of insurance. Therefore, the remaining issue left for us to resolve is whether sections 13-64-403(3) and (4) of the Colorado HCAA are state laws enacted "for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act. If so, the FAA will

not preempt the HCAA and the arbitration agreement in this case is unenforceable.

The United States Supreme Court has decided two key cases clarifying when a state law has been enacted "for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act.[7] In *SEC v. National Securities, Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), the Court focused on the relationship between the insurance company and the policyholder and held that any state statute "aimed at protecting or regulating this relationship," either directly or indirectly, is a law regulating the "business of insurance" under the meaning of the Act. *Id.*[8]

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[7] Other cases addressing the meaning of "business of insurance" in an ERISA context are similar to McCarran-Ferguson cases, but the Supreme Court has recently made clear that the two inquiries are separate and distinct. *Kentucky Ass'n of Health Plans, Inc. v. Miller*, ___ U.S. ___, ___, 123 S.Ct. 1471, 1479, 155 L.Ed.2d 468 (2003).

[8] In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982), the Supreme Court identified three specific, but non-determinative, considerations to be weighed when determining whether certain *practices by private actors* constitute the "business of insurance." These criteria include whether the practice: (1) has the effect of transferring or spreading a policyholder's risk; (2) is an integral part of the policy relationship between the insurer and the insured; and (3) is limited to entities within the insurance industry. *Id.* (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979)). We do not specifically rely on the *Pireno* and *Royal Drug* factors because these factors arise from cases seeking to characterize conduct by private actors in the antitrust context under the *second clause* of section 1012(b). *See United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 504-05, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). These factors do not apply directly to the broader issue, under the *first clause* of section 1012(b), of whether a state law has been enacted for the "purpose of regulating the business of insurance." *Id.; see also Miller*, ___ U.S. ___, 123 S.Ct. 1471, 155 L.Ed.2d 468.

In this case, the trial court incorrectly framed the *Pireno* factors as a mandatory three-part test, of which all three factors had to be met before the law could be characterized as regulating the "business of insurance."

More recently, the Supreme Court re-emphasized the *National Securities* principle in *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), maintaining that the essence of regulating the business of insurance is to regulate the relationship between the insurance company and the policyholder. *See id.* at 501, 113 S.Ct. 2202. Under this principle, a federal law must yield to a state statute to the extent that the state statute "furthers the interests of policyholders." *Id.* at 502, 113 S.Ct. 2202.

Following *Fabe*, the Tenth Circuit Court of Appeals has similarly focused the "business of insurance" test on whether the state statute in question was enacted for the purpose of protecting policyholders. *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir.1998) (finding that McCarran-Ferguson exempted a state court's blanket stay order from FAA preemption because the stay "manifests a purpose of protecting policyholders" in a liquidation setting). *Davister* is consistent with a line of cases focusing on whether the state law directly regulates the contractual relationship between an insurer and insured. *See, e.g., Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 933 (10th Cir.1992) (holding that a Kansas statute expressly invalidating an arbitration agreement contained in an insurance contract is a statute that touches the core of the 'business of insurance' under the meaning of McCarran-Ferguson); *Cox v. Woodmen of the World Ins. Co.*, 347 S.C. 460, 556 S.E.2d 397, 401-02 (S.C.Ct.App.2001) (a South Carolina statute barring arbitration in an insurance contract is "an integral part of the policy relationship between the insurer and the insured" because it places limits on the enforceability of an agreement to spread risk).

In this case, sections 13-64-403(3) and (4) of the Colorado HCAA not only directly regulate contracts between health insurance policyholders and their insurers (in this case,

HMOs[9]), but also further the interests of these policyholders. Sections 13-64-403(3) and (4) directly regulate health insurance contracts by requiring HMOs to include specific notice language, in ten-point, bold-faced type, of any arbitration agreement contained within the health insurance contract. If the HMO that drafted the insurance contract fails to give the policyholder proper notice of the arbitration agreement, the HCAA protects the policyholder by invalidating that provision of the contract. By regulating health insurance contracts drafted by the health care provider and by protecting patients who are insured by that provider, sections 13-64-403(3) and (4) of the HCAA qualify as laws enacted "for the purpose of regulating the business of insurance." *Accord Smith v. PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal.App.4th 139, 161, 113 Cal.Rptr.2d 140 (2001) (holding that the McCarran-Ferguson Act applies to a state statute specifically regulating the words that an HMO can use when including an arbitration clause in its medical services plan).

It is irrelevant that other sections of the HCAA, outside of sections 13-64-403(3) and (4), address medical malpractice issues not involving the relationship between an insurer and insured. *Fabe* makes clear that a statute, "to the extent that it regulates policyholders," qualifies as a statute "enacted for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act. *Fabe*, 508 U.S. at 508, 113 S.Ct. 2202. Moreover, the fact that sections 13-64-403(3) and (4) of the HCAA apply to "health care providers"

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[9] HMOs simultaneously function as health care providers and health care insurers. *See Rush Prudential HMO, Inc., v. Moran*, 536 U.S. 355, 367-70, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002); *Imbler v. PacifiCare of Cal., Inc.*, 103 Cal.App.4th 567, 573, 126 Cal.Rptr.2d 715 (2002). Given the modern reality that HMOs have virtually replaced traditional health care insurers, the relationship between an HMO "medical service provider" and "patient" is the relationship between a "medical insurer" and "insured."

instead of exclusively to insurers such as HMOs does not nullify our conclusion that sections 13-64-403(3) and (4) were enacted for the "purpose of regulating the business of insurance." As long as the statute is not one of general applicability, it is not necessary that the state statute relate only to insurance or that the statute be in the form of an insurance code. *Great Plains*, 969 F.2d at 934. Therefore, the fact that sections 13-64-403(3) and (4) of the HCAA technically include non-insurer "health care providers" such as physicians does not prevent these sections of the HCAA from qualifying as statutes enacted "for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act.

In sum, to the extent that sections 13-64-403(3) and (4) of the HCAA do specifically regulate the relationship between a health insurer and its policyholder, *see National Securities*, 393 U.S. at 460, 89 S.Ct. 564, and to the extent that these provisions of the HCAA do further the interests of these policyholders by ensuring adequate notice of arbitration agreements, *see Fabe*, 508 U.S. at 502, 113 S.Ct. 2202, the HCAA is a statute "enacted for the purpose of regulating the business of insurance" under the meaning of the McCarran-Ferguson Act.

The McCarran-Ferguson Act therefore exempts sections 13-64-403(3) and (4) of the HCAA from federal preemption by the FAA, meaning that those sections of the HCAA govern the arbitration agreement in this case. Because the agreement here does not comply with sections 13-64-403(3) and (4) of the HCAA, the agreement is unenforceable and Pacheco is not required to submit her wrongful death claim to binding arbitration.

IV. Conclusion

For the foregoing reasons, we reject the analysis of the court of appeals but uphold the result it reached. We conclude that the scope of the arbitration agreement between Kaiser and Pacheco's husband includes wrongful death claims brought by non-party spouses. The arbitration agreement is unenforceable, however, because it does not comply with the Colorado HCAA. Therefore, we affirm the judgment of the court of appeals.

Justice KOURLIS dissents, and Justice BENDER joins in the dissent.

Justice KOURLIS, dissenting:

Because I do not read the Colorado Health Care Availability Act, § 13-64-403, 5 C.R.S. (2002), as a law aimed at regulating the "business of insurance," I do not view the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1997), as applicable. For that reason, although I concur in the Majority's conclusion that the arbitration agreement at issue here applies to wrongful death actions and to non-party spouses, I respectfully dissent from the conclusion that the McCarran-Ferguson Act exempts sections 13-64-403(3) and (4) of the Colorado Health Care Availability Act from federal preemption.

I. The Colorado Health Care Availability Act

The analysis in this case is complex and, for me, is best undertaken in simple steps. There are three relevant pieces of legislation, state and federal, which come into play. The first is the Colorado Health Care Availability Act ("HCAA"), specifically Part 4, Procedures and Evidence in Medical Malpractice Actions. §§ 13-64-401 *et. seq.*, 5 C.R.S. (2002). The HCAA evidences the General Assembly's intent that arbitration agreements be a voluntary and knowing contractual undertaking between the patient and the health care provider. To that end, the statute requires certain bold-faced language in the agreement, designed to notify the patient that by signing the agreement, he or she is "agreeing to have any issue of medical malpractice decided by neutral binding arbitration rather than by a jury or court trial." § 13-64-403(4). It is undisputed that in this case, the agreement did not contain that notice and thus, would be unenforceable.[1] To

[1] We so held in *Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218, 1226 (Colo.1996). We did not address the FAA preemption argument in that case because it was not raised and preserved at the trial court level.

this point in the analysis, therefore, by operation of Colorado law, the arbitration award in this case would be vacated and Karen Pacheco would be entitled to proceed in her wrongful death lawsuit.

II. The Federal Arbitration Act

The next step in the analysis, however, involves the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et. seq.* (1999). I agree with the Majority that the FAA would apply to this contract, but because I would also hold that it is the focal or dispositive statute, I expand upon the Majority's discussion somewhat. The FAA states that:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The purpose of the FAA is to "overcome courts' refusals to enforce agreements to arbitrate" and is grounded in Congress' powers under the Commerce Clause. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). In enacting the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). Generally, then, the FAA preempts state law that conflicts with it, by operation of the Supremacy Clause. U.S. Const. art. VI, cl. 2.

The agreement here pertains to transactions involving commerce, in that it provides for medical services in other states to its Colorado members. *See Grohn v. Sisters of*

Charity Health Svcs. Colo., 960 P.2d 722, 725-26 (Colo. App.1998) (hospital's business activities, which include payment of out-of-state medical costs of in-state insureds, and receipt of goods and services from out-of-state vendors constitute transactions "involving commerce" within the ambit of the FAA). Hence, the only question is whether the FAA would otherwise apply to invalidate the specific proscriptions of the HCAA and render the arbitration agreement enforceable even though it does not comply with the HCAA.

The FAA establishes federal substantive law that governs issues of enforceability for all arbitration agreements that involve commerce. *Perry v. Thomas*, 482 U.S. 483, 489, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). To the extent that any state law conflicts with the FAA, that state law is preempted by operation of the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2; *Southland Corp.*, 465 U.S. at 16, 104 S.Ct. 852; *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

An arbitration clause almost identical to the one at issue here was held enforceable by the United States District Court for the District of Colorado in *Morrison v. Colorado Permanente Medical Group, P.C.*, 983 F.Supp. 937 (D.Colo. 1997). In that case, the court viewed *Doctor's Associates* as dispositive. The Supreme Court, in *Doctor's Associates*, held that the FAA preempted a Montana statute, which also required arbitration agreements to contain a special notice, in underlined capital letters. The Court held:

> By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed "upon the same footing as other contracts." Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the

> enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act.

517 U.S. at 687, 116 S.Ct. 1652 (internal citations omitted). Following the Court in *Doctor's Associates*, the court in *Morrison* held that the medical services arbitration provisions found in sections 13-64-403(3) and (4) of the HCAA were preempted by the FAA. 983 F.Supp. at 943.

By creating special language requirements for arbitration provisions in medical service agreements, it is my view that the HCAA does indeed impose special conditions on medical arbitration agreements not applicable to contracts generally. Accordingly, those special requirements imposed by Colorado legislation would be preempted by the FAA, and the arbitration clause in this agreement would be valid and enforceable even though it does not contain the special notice required by the HCAA.

III. The McCarran-Ferguson Act

The final step in this inquiry then must turn to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1997), which the Majority holds would operate to preclude the FAA from applying and would therefore revive the Colorado statutory requirements. That Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . ." 15 U.S.C. § 1012(b). Pacheco argues, and the Majority agrees, that this Act operates as a bar to what would otherwise be FAA preemption because sections 13-64-403(3) and (4) of the Colorado HCAA involve the "business of insurance." On this point, I disagree.

The history of the McCarran-Ferguson Act is relevant to the limited construction I here suggest. McCarran-Ferguson was enacted in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). In that case, the Court held that insurance transactions were subject to federal regulation in general under the Commerce Clause, and to the antitrust laws in particular. *Id.* at 553, 560-61, 64 S.Ct. 1162. Prior to that, the states had assumed the exclusive regulation of insurance. Congress acted by passing the McCarran-Ferguson Act to assure that the states would continue to have "a free hand in regulating the dealings between insurers and their policyholders," *Sec. & Exch. Comm'n v. Nat'l Sec., Inc.*, 393 U.S. 453, 459, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969), but did not intend "to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision [in *South-Eastern*]." *Id.* (quoting H.R.Rep. No. 143, 79th Cong., 1st Sess., 3 (1945)).

In *National Securities*, the Supreme Court was called upon to determine whether an action by the Securities and Exchange Commission to invalidate a merger of insurance companies that had been approved by the State of Arizona was barred by the McCarran-Ferguson Act. The Court held that it was not, noting in its analysis that the McCarran-Ferguson Act was intended to protect the dealings between insurance companies and their policyholders, and not to protect the many other activities in which insurance companies engage. *Id.* at 460, 89 S.Ct. 564. In an effort to explain the reach of the Act and what would constitute the "business of insurance," the Court stated:

> Certainly the fixing of rates is part of this business. . . . The selling and advertising of policies, and the licensing of companies and their agents are also within the scope of the statute. Congress was concerned with the type of

> state regulation that centers around the contract of insurance. . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.

Id. (internal citations omitted). Importantly, the Court distinguished between provisions of state law focusing on the relationship between *stockholders* and the company, and provisions dealing specifically with service to *policyholders*. *Id.* The Court held that the former was not within the scope of McCarran-Ferguson, while the latter was.[2] *Id.* at 460-62, 89 S.Ct. 564.

The Court again provided guidance for the application of the McCarran-Ferguson Act in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). In that case, the Court held that a health insurance provider's use of a professional association's peer review committee to determine reasonableness and necessity of chiropractic charges did not constitute the "business of insurance" so as to be exempted from application of federal antitrust laws. *Id.* at 129, 102 S.Ct. 3002. The Court outlined three factors, commonly referred to as the *Pireno* factors, to

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[2] While the court found that the provision requiring the State Director of Insurance to conclude that the security of and services rendered to policyholders would not be substantially reduced by a proposed merger before approving it was within the scope of McCarran-Ferguson, as it clearly related to the "business of insurance," the Court found no conflict between the federal and state law and allowed application of both. *Id.* at 462, 89 S.Ct. 564.

assist in determining what constitutes the "business of insurance:" "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Id.* (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979)). While noting that not one of the factors was in itself determinative, the court found that the Peer Review Committee met none of the factors and was not, therefore, part of the "business of insurance." *Id.* at 129-32, 102 S.Ct. 3002.

In *United States Department of Treasury v. Fabe*, 508 U.S. 491, 504, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), the Court held that an Ohio bankruptcy priority statute relating to liquidation of a bankrupt insurance company escaped federal bankruptcy law preemption by operation of the McCarran-Ferguson Act because the Ohio law was "designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy." In *Fabe*, the Court did observe that it had developed and applied the *Pireno* factors in the context of analyzing Sherman Antitrust Act issues under the second clause of the McCarran-Ferguson Act, and that those factors were, therefore, not definitive. *Id.* at 505, 113 S.Ct. 2202; *see also Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277, 1281 (10th Cir.1998) (holding that a Utah state statute consolidating all claims against a liquidating insurer was enacted to protect policyholders and was, therefore, exempt from application of the FAA by reason of the McCarran-Ferguson Act). However, even without the *Pireno* factors, the court in *Fabe* held that the business of insurance preserved to state regulation relates to the rights of policyholders. *Fabe*, 508 U.S. at 506, 113 S.Ct. 2202.

Hence, to the extent that *Pireno* continues to apply to non-antitrust inquiries, I would observe that the Colorado HCAA provisions at issue are not "integral to the policy relationship between" the medical service provider and its insurer, nor do they regulate, constrain, set benefits, exclusions or limitations that effect the relationship between the insurer and the policyholders.

Even if the proper inquiry in determining whether the statute at issue is whether the statute is "aimed at protecting or regulating" the relationship between the insurance company and the policyholder, Maj. op. at 382-383, I suggest that the HCAA cannot meet that test. The provisions of the Colorado HCAA at issue here, specifically part 4, deal with "Procedures and Evidence in Medical Malpractice Actions." As the title indicates, the primary purpose of these provisions is to control and constrain medical malpractice actions, not to regulate the insurance policy itself. Indeed, the effect of the statute may be to reduce medical malpractice premiums; however, that consequence does not change the fact that the provisions were enacted to control medical malpractice *actions*, not medical malpractice insurance within the meaning of the McCarran-Ferguson Act. It is particularly evident that sections 13-64-403(3) and (4) of the HCAA is not related to the "business of insurance" because its focus is solely on protecting the informed choice of *patients*, so as not to bind them to an arbitration clause without their knowledge. That purpose is not about insurance.

Beginning with the easy axiom, if the HCAA arbitration provision were a general law concerning what an arbitration agreement must contain in order to be valid in Colorado, that law would likely find no shelter within the McCarran-Ferguson Act, but would rather be construed as a law of general application. *See Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir.1971) (enforcing an arbitration agreement by holding the McCarran-Ferguson Act did not apply because

the court found the provisions had general applicability to contract disputes); *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606 (2nd Cir.1969) (finding that arbitration statutes did not regulate the "business of insurance"; rather, they regulated the method of handling contract disputes generally); *Am. Bankers Ins. Co. v. Crawford*, 757 So.2d 1125 (Ala.1999) (enforcing an arbitration agreement in a policy despite State's anti-arbitration statute because statute did not regulate the "business of insurance" as to prevent enforcement of the policy under the FAA). As the Colorado HCAA applies generally to medical service providers and their patients, and not specifically to the relationship between insurers and their insureds, it would be a law of general application, and thus not subject to the McCarran-Ferguson savings clause.

Thus, it is the placement of the arbitration clause limitation language within the HCAA that must be the pivotal factor—it must evidence the General Assembly's intent to regulate only certain arbitration agreements that impact upon or relate to insurance. I do not so read the HCAA. Rather, I read the HCAA not as aimed at the relationship between the medical services provider and the insurer, but rather as being aimed at the relationship between the medical services provider and the patient. Granted, the General Assembly did indeed express its intent in enacting the legislation to contain the increasing costs of malpractice insurance,[3] but they chose to address that goal by limiting the remedies available to a patient claiming malpractice against a medical services provider—not by regulating the amount which an insurer could charge in premiums or by regulating the nature of

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[3] Notably, the result advocated by the Majority would have the converse result. Application of the McCarran-Ferguson Act to the Colorado HCAA operates to disadvantage the doctor, as a malpractice insurance policyholder, because he will be subjected to a full trial, rather than having recourse in the enforcement of the arbitration award.

coverage the insurers could or should provide. For example, although "qualified insurer" is a defined term, it appears only twice in the HCAA: in the section concerning periodic installment obligations, section 13-64-206, and in the section concerning funding that obligation, section 13-64-208.

The HCAA is about containing and limiting malpractice awards, with the intent thereby of reducing malpractice insurance premiums and stemming the exodus of doctors from the profession. To say that it is "aimed at the business of regulating insurance" is to say that any legislation that has an effect on insurance premiums is aimed at the business of regulating insurance. So, for example, legislation requiring drivers to wear seat belts or motorcycle riders to wear helmets would be aimed at the business of regulating insurance because it could have an effect on insurance premiums. In short, I suggest that the interpretation the Majority affords the McCarran-Ferguson Act sweeps with a broad and wide arc that could swallow federal preemption under the Supremacy Clause.

IV. Conclusion

Accordingly, although I concur in portions of the Majority opinion, I dissent from the ultimate result and would instead reverse the court of appeals' opinion and uphold the trial court's judgment enforcing the arbitration award.

I am authorized to state that Justice BENDER joins in this dissent.

APPENDIX B

COLORADO COURT OF APPEALS
DIVISION I

No. 00CA1624

KAREN PACHECO,
Plaintiff-Appellant,

v.

LAWRENCE S. ALLEN, M.D.; MICHAEL K. MILLER, M.D.;
TIMOTHY R. COLLINS, M.D.; and
COLORADO PERMANENTE MEDICAL GROUP, P.C.,
Defendants-Appellees.

Sept. 13, 2001.
Certiorari Granted Sept. 23, 2002.

Opinion by Judge METZGER.

In this wrongful death action, plaintiff, Karen Pacheco, appeals the judgment confirming the arbitration award entered in favor of defendants, Lawrence S. Allen, M.D., Michael K. Miller, M.D., and Timothy R. Collins, M.D. (defendant physicians), and Colorado Permanente Medical Group, P.C. (CPMG), their employer. We reverse and remand for further proceedings.

Plaintiff's husband died following extended hospitalization for treatment of pancreatitis. Plaintiff subsequently commenced this wrongful death action, alleging that defendant physicians had been negligent in diagnosing and treating her husband.

The medical services at issue were provided by defendant physicians, who were employed by CPMG, a physician group

that had contracted with Kaiser Foundation Health Plan of Colorado (Kaiser) to provide medical care to Kaiser enrollees. Kaiser's Medical and Hospital Service Agreement requires arbitration of Medical Malpractice Claims:

> It is understood that any claim of medical malpractice, including any claim that medical services were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered or omitted, will be determined by submission to binding arbitration in accordance with the provisions of the "Uniform Arbitration Act of 1975", part 2 of article 22 of title 13, Colorado Revised Statutes, and not by a lawsuit or resort to court process except as Colorado law provides for judicial review of arbitration proceedings. . . .

Defendants filed a motion to compel plaintiff to submit to binding arbitration, as required by her husband's agreement with Kaiser. Plaintiff objected. The trial court granted the motion, and the case was arbitrated.

After the arbitrator entered an award in favor of defendants, plaintiff filed a motion to vacate the award, alleging that no enforceable arbitration agreement existed. She also asked the court to reconsider its order compelling arbitration. This appeal follows the denial of her requests by the trial court, a different judge presiding.

Plaintiff contends the trial court erred in determining she was a party to the agreement and that, therefore, she was bound by its requirement that disputes must be arbitrated. We agree.

The agreement provides:

> Claims . . . shall be submitted to binding arbitration if the claim is asserted:
>
> (a) By a Member, or by a Member's heir or personal representative, or by a person claiming that a duty to

him or her arises from a Member's relationship with Health Plan, Hospitals or Medical Group incident to this Agreement . . .

(b) For any reason, including, but not limited to, death, mental disturbance, bodily injury or economic loss arising from the rendition or failure to render services or the provision or failure to provide benefits under this Agreement or the consideration or defense of claims described in this Section,

(c) For monetary damages exceeding the jurisdictional limit of the Small Claims Court, and

(d) Against one or more of the following . . .

(i) Health Plan,

(ii) Hospitals,

(iii) Medical Group,

(iv) Any Physician, or

(v) Any employee or agent of the foregoing.

Because an arbitration agreement is a contract, a party cannot be required to submit a dispute to arbitration that he or she has not agreed to submit. *See Everett v. Dickinson & Co.*, 929 P.2d 10 (Colo.App.1996). Similarly, a nonparty to an agreement containing an arbitration clause may not be compelled to use arbitration procedures. *See City & County of Denver v. District Court*, 939 P.2d 1353 (Colo.1997); *see also Eychner v. Van Vleet*, 870 P.2d 486 (Colo.App.1993).

The record contains no evidence that plaintiff agreed to submit her claim to arbitration or that she signed the agreement. Thus, she is not a party to the agreement and is not bound by its terms.

Additionally, we conclude that plaintiff is not bound by the arbitration provision because she is not an "heir" of her husband. In wrongful death actions, that term refers only to

lineal descendents of the deceased and not to a spouse. *See Hindry v. Holt*, 24 Colo. 464, 51 P. 1002 (1897); *Whitenhill v. Kaiser Permanente*, 940 P.2d 1129 (Colo.App.1997). Thus, the agreement's provision binding an heir does not apply to plaintiff.

Further, we note that plaintiff's wrongful death claim is not covered by the terms of the agreement.

Colorado law is clear that the cause of action created by the Wrongful Death Act, § 13-21-201, et seq., C.R.S.2001, is separate and distinct from the cause of action the deceased would have had for personal injuries had he survived. The Wrongful Death Act is not a survival statute. *Fish v. Liley*, 120 Colo. 156, 208 P.2d 930 (1949). Therefore, as a division of this court held in *Rowell v. Clifford*, 976 P.2d 363 (Colo.App.1998), even when the statute of limitations would have barred the decedent's personal injury claim as of the time of his death, the decedent's surviving spouse had a separate and viable wrongful death claim with its own statute of limitations.

Because plaintiff's cause of action for wrongful death here is wholly separate and distinct from any action her husband might have maintained, the arbitration provision is not applicable to her.

Finally, we reject defendants' assertions that the broad language of the agreement, which states that "claims . . . by a member's heir . . . for any reason . . . against any physician" shall be submitted to binding arbitration, makes it applicable to plaintiff. The omission of the term "spouse," assuming one can bind the other, and the fact that a wrongful death action is wholly separate from a claim for personal injuries are critical distinctions, which we cannot overlook. Moreover, even if we were to say that the agreement is ambiguous, we would be required to construe it against Kaiser as the drafter. *State Farm v. Stein*, 940 P.2d 384 (Colo.1997).

Nor do we agree with defendants that the decision in *Herbert v. Superior Court*, 169 Cal.App.3d 718, 215 Cal. Rptr. 477 (1985), compels a different result. There, the California court held that a decedent's spouse and adult children, none of whom had signed the agreement to arbitrate, were nevertheless bound by it. The court reasoned that nonsigning heirs should be bound by their decedent's agreement to arbitrate all disputes for the following reasons: (1) a single cause of action exists in the heirs for the wrongful death of a decedent; (2) a wrongful death action, in a practical sense, is derivative of a cause of action in the deceased; (3) it is unrealistic and impractical to require the signatures of all the heirs (who are not- identified until the time of the decedent's death); (4) decedents can bind their heirs through contracts and wills; and (5) arbitration is neither an extraordinary procedure nor disadvantageous to the heirs.

Because an action under the Colorado Wrongful Death Act is not derivative of a cause of action in the deceased, *Fish v. Liley, supra; Rowell v. Clifford, supra*, this difference in the characterization of wrongful death actions renders the decision in *Herbert v. Superior Court, supra*, inapposite.

Consequently, the decedent's agreement with Kaiser does not apply to plaintiff, and the trial court erred in requiring her to arbitrate her claim.

In light of this disposition, it is unnecessary to address plaintiff's other contentions of error.

The judgment is reversed, and the case is remanded for further proceedings.

Chief Judge HUME and Judge ROY, concur.

APPENDIX C

DISTRICT COURT, CITY AND COUNTY OF DENVER
STATE OF COLORADO
Courtroom 7

[Filed Jul. 19, 2000]

Case No. 98CV2340

KAREN PACHECO,

Plaintiff,

v.

LAWRENCE S. ALLEN, M.D., MICHAEL K, MILLER, M.D.,
TIMOTHY R. COLLINS, M.D., and
COLORADO PERMANENTE MEDICAL GROUP, P.C.

Defendants.

ORDER

Plaintiff in this matter has filed a Motion to Vacate Arbitration Award and for Reconsideration. Following the briefing of that motion, Defendants filed their Motion for Entry of Judgment.

The court hereby orders that Plaintiff's Motion to Vacate Arbitration Award and for Reconsideration is denied. Judgment shall enter for Defendants and against the Plaintiff in the amount of $30,900.70.

Dated this 18 day of July, 2000.

BY THE COURT

/s/ Warren O. Martin
WARREN O. MARTIN
District Court Judge

cc: Gary S. Cohen, Esq.
Daniel M. Hubbard, Esq.

APPENDIX D

IN RE ARBITRATION
AWARD OF ARBITRATOR

[Filed Mar. 24, 2000]

KAREN PACHECO,

Plaintiff,

v.

LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D.,
TIMOTHY R. COLLINS, M.D., and
COLORADO PERMANENTE MEDICAL GROUP, P.C.

Defendants.

From March 8, 2000, to March 16, 2000, a complete arbitration was held in which KAREN PACHECO, plaintiff above named, was claimant, and LAWRENCE S. ALLEN, M.D., MICHAEL K. MILLER, M.D., TIMOTHY R. COLLINS, M.D., and COLORADO PERMANENTE MEDICAL GROUP, P.C., defendants above named, were respondents. Claimant-plaintiff was represented by Gary S. Cohen, Esq. Respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., Timothy R. Collins, M.D., and Colorado Permanente Medical Group, P.C. were represented by Daniel M. Hubbard, Esq. and Teresa L. Thrailkill, Esq.

This arbitration was ancillary to Case Number 98 CV 2340, Courtroom 7, now pending in the District Court, City and County of Denver, State of Colorado.

The arbitrator heard and examined the evidence and considered the statements of counsel, and based thereon,

THE AWARD OF THE ARBITRATOR is as follows:

I. UNDERLYING FACTS.

A. Undisputed Facts.

February, 1997, Mark Pacheco, husband of claimant-plaintiff was admitted to Saint Joseph Hospital in Denver, Colorado for the treatment of pancreatitis. At Saint Joseph Hospital he was under the care and treatment of physicians employed by respondent-defendant Colorado Permanente Medical Group, P.C.

Colorado Permanente Medical Group, P.C. is a group of physicians who contract with the Kaiser Permenente Health Care Program to treat persons who are members of that plan. Respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., and Timothy R. Collins, M.D., are all physicians who are members of Colorado Permanente Medical Group, P.C. and are employees, or "servants," of that corporation. The respondent-defendant physicians were not involved in the treatment of Mark Pacheco during that first admission to Saint Joseph Hospital.

On February 14, 1997, Mark Pacheco was placed on total parenteral nutrition. Total parenteral nutrition is usually referred to as TPN. It is designed to provide the entire nutritional needs of the patient to which it is administered; however, due to a national shortage, and contrary to the instructions of the physician who ordered the TPN, that provided to Mark Pacheco did not contain multivitamins. The physician who initially ordered the TPN was not an employee of Colorado Permanente Medical Group, P.C. The fact that the TPN did not include multivitamins was noted in the hospital chart of Mark Pacheco.

Among the multivitamins which were not included in the TPN provided for Mark Pacheco was thiamine. This vitamin is essential to the Krebs cycle, a process in human cells by

which glucose and its derivative pyruvate is converted into energy. This process is essential to life. In the absence of thiamine the pyruvate which would otherwise be converted to energy instead becomes lactate. This constitutes the disease beriberi. If uncorrected it is fatal.

On February 28, 1997, Mark Pacheco was discharged from Saint Joseph Hospital and returned home. The TPN continued to be the principal source of nutrition for Mark Pacheco, although he received some clear liquids such as clear fruit juice by mouth. His condition deteriorated at home, and on March 17, 1997, he was readmitted to Saint Joseph Hospital. He died at the hospital on March 21, 1997.

Under the Kaiser plan certain physicians employed by Colorado Permanente Medical Group, P.C. are stationed at the hospital full time, and are responsible for the care of hospitalized Kaiser members during their respective tours of duty. On March 18 and 19, respondent-defendant Lawrence S. Allen, M.D., was on duty and was responsible for the care of Mark Pacheco. On March 20, 1997, Dr. Allen was relieved by respondent-defendant Michael K. Miller, M.D., who was responsible for the care of Mark Pacheco from that time until Mark Pacheco's death. On March 20, 1997, Dr. Miller asked respondent-defendant Timothy R. Collins, M.D. to see Mark Pacheco. Dr. Collins did so and made certain recommendations concerning his care.

Dr. Allen, Dr. Miller and Dr. Collins are all board-certified specialists in internal medicine. Dr. Collins is also board certified in pulmonology and critical care. The standards of care for their respective specialties are therefore national not local.

Mark Pacheco's condition deteriorated rapidly during his March, 1997, stay at Saint Joseph Hospital. It was the unanimous opinion of Dr. Allen, Dr. Miller and Dr. Collins that his condition was due to sepsis, which is generally

defined as a toxic condition resulting from the spread of bacteria or their products from a focus of infection.

During Mark Pacheco's hospital stay it was noticed that he suffered from a condition known as lactic acidosis. This condition is caused by an excess of lactate in the system. When initially observed the lactate level was 6.9. On subsequent observations it declined to 6.4 and then to 4.9. All of these levels are well above normal. The pH level shown by Mark Pacheco's blood tests remained high, showing a continued acid condition.

Prior to the time of Mark Pacheco's hospitalization and death, a number of articles had appeared in medical journals documenting a relationship between life-threatening lactic acidosis and a lack of thiamine in TPN. The articles pointed out rapid cures which had occurred after the administration of thiamine. These articles and their contents were not part of the common knowledge of internal medicine specialists, but were readily discoverable by searching medical literature.

Thiamine deficiency and beriberi are very rare in the United States because thiamine is amply available in the American diet. A number of the physicians who testified had had experience in treating suspected thiamine deficiency, primarily in alcoholics, but with one exception, none had seen or treated actual beriberi. The treatment for thiamine deficiency is the administration of thiamine, which is inexpensive and free from harmful side effects.

After the death of Mark Pacheco, an autopsy was performed. The pathologist reported, "A definitive immediate cause of death was not determined." The pathologist testified that this is quite unusual, occurring in from five to ten percent of cases in his experience. The pathology report indicated "several significant findings at autopsy which additively could have explained the patient's demise." These included an approximately 90% blockage of one of the coronary

arteries, chronic pancreatitis, a colonization of certain strains of staphylococcus bacteria on a Hohn catheter tip, and fatty changes in the liver.

B. Disputed Facts

A principal dispute among the parties is over the cause of death.

Claimant-plaintiff points out the lactic acidosis observed in Mark Pacheco during the later stages of his illness and the lack of findings confirming sepsis in the autopsy. One of complainant-plaintiff's experts called autopsy the "gold standard" for determining such matters. Claimant-plaintiff and her experts therefore deny that sepsis was the cause of Marl Pacheco's death.

These experts contend that the records of Mark Pacheco's final hospitalization confirm a diagnosis of wet beriberi or Shoshin beriberi. They testified that this condition was caused by the failure to include thiamine in the TPN provided for Mark Pacheco. In their view the small amount of clear fruit juice consumed by Mark Pacheco was insufficient to satisfy his needs for thiamine. They contend that the decreasing level of the lactate levels observed in Mark Pacheco, although not clearly explainable, was probably due to a general collapse of his system.

These experts assert that thiamine deficiency or beriberi was the cause of Mark Pacheco's death. They recognize that the autopsy did not confirm beriberi, but contend that this is because the autopsy did not include examination of Mark Pacheco's head where evidence of beriberi would have been found.

Claimant-plaintiff claims that respondent-defendant physicians had received actual knowledge of the lack of multivitamins in the TPN, or, in any event, should have known of it had they adequately examined Mark Pacheco's chart. She

and the experts testifying for her assert that there were several indications in the chart the multivitamins were missing. They contend that it was the duty of the respondent-defendants to know contents of the TPN, and point out that Dr. Miller did in fact review the TPN.

In the view of the claimant-plaintiff and the experts testifying for her, the knowledge the respondent-defendant physicians had or should have had concerning the lack of multivitamins in the TPN together with the observation of lactic acidosis should have lead them to conduct a literature search. Such a search would have revealed the medical journal articles and the relationship of the beriberi to Mark Pacheco's condition. If this had been done, claimant-plaintiff and her experts contend, the attending physicians would have administered thiamine and Mark Pacheco would have recovered in a few days or even perhaps in a few hours. Mark Pacheco could then have looked forward to a normal or near-normal life expectancy.

Respondent-defendants claim that Mark Pacheco's symptoms overwhelmingly point to sepsis. They contend that it is not uncommon that the actual organism involved in a case of sepsis is not identified. Certain of the outside experts called by respondent-defendants point to the colonization of staphylococcus bacteria on the Hohn catheter tip as the likely source of the infection; however, this view is not held by all of those testifying for respondent-defendants. It is not the view of Dr. Janet S. Kuhns, an infectious disease specialist who examined Mark Pacheco as a consultant.

Respondent-defendants and their experts maintain that the symptoms shown by Mark Pacheco were not consistent with beriberi. They point out that the lactate levels manifested by Mark Pacheco were declining rather than increasing. They interpret this to mean that the lactic acidosis suffered by Mark Pacheco was improving. This they contend is contrary to what would have been expected if lack of thiamine was the

culprit. They also contend that the presence of feces in Mark Pacheco's intestine indicates that he had nutrition beyond TPN and clear fruit juice.

Respondent-defendant physicians deny that they knew of the multivitamin shortage in 1997 or that they knew or had reason to know that the TPN supplied to Mark Pacheco did not contain multivitamins.

Respondent-defendants also point out that the lactate levels manifested by Mark Pacheco, even at their worst, were far below those reported in the literature in patients who had suffered from and were cured from thiamine deficiency as a result of lack of multivitamins in TPN.

As pointed out above, only one of the witnesses had actually seen or treated confirmed beriberi. This witness was Dr. Daniel Citron, who had encountered dry beriberi while serving with Doctors Without Borders in Thailand. His encounters with dry beriberi had led him to research wet beriberi and Shoshin beriberi. He testified that Mark Pacheco did not manifest the symptoms of beriberi.

II. CONCLUSIONS OF THE ARBITRATOR.

A. Cause of Death

The burden of proof is upon the claimant-plaintiff to prove by a preponderance of the evidence that the death of Mark Pacheco was due to a thiamine deficiency which in turn was caused by the lack of thiamine in Mark Pacheco's TPN. Although claimant-plaintiff produced some effective evidence in this regard, the arbitrator ultimately has concluded that the burden was not met.

In reaching this conclusion the following factors discussed above were particularly persuasive:

1. The lactate levels observed in Mark Pacheco were very substantially below those reported in the medical

journals in the cases of illness due to thiamine deficiency in TPN.

2. The decrease in the lactate levels in Mark Pacheco observed during the course of his final hospitalization is inconsistent with the thiamine deficiency theory. The explanation of a general breakdown is not convincing.

3. Dr. Citron testified that Mark Pacheco did not manifest the symptoms which are characteristic of beriberi. Dr. Citron appeared to be the witness most conversant with the disease as a result of his experiences and research in Thailand. His testimony was, therefore, particularly persuasive.

The arbitrator has also noted the evidence concerning the oral intake of the Mark Pacheco. The arbitrator makes no finding as to whether the fruit juice all parties agree he consumed was sufficient to meet his needs; however, those needs are admittedly small. The arbitrator makes no finding as to whether Mark Pacheco consumed any solid food.

On the basis of the foregoing it is the conclusion of the arbitrator that it has not been established that it is more probable than not that the death of Mark Pacheco was caused by thiamine deficiency.

The arbitrator is not unaware of the problems in confirming a diagnosis of sepsis. The failure to establish a definite focus of infection even on autopsy is particularly disturbing. It was, however, the diagnosis arrived at by all treating physicians, and is consistent with the conditions observed in Mark Pacheco during his last illness. As the cause of the death of Mark Pacheco, sepsis is at least as probable as is thiamine deficiency. The claimant-plaintiff bears the burden of proof, not the respondent-defendants.

B. Standard of Care and Life Expectancy.

The arbitrator's finding regarding the cause of death makes detailed findings concerning compliance with the standard of

care and life expectancy unnecessary. The arbitrator's conclusion is that the care provided to Mark Pacheco by respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., and Timothy R. Collins, M.D. was not below the standard of care required of internal medicine specialist physicians at the time such care was furnished. The life expectancy of Mark Pacheco was substantially less than the average of men of his age.

C. Costs and Costs of Arbitration.

The respondents-defendants are entitled to costs in this matter to the extent that they are recoverable in a normal civil action.

The parties have agreed that the costs of arbitration and of the arbitration location should be divided equally between the parties unless the arbitrator rules otherwise. This arbitration was ordered on application of the respondent-defendants and over the objection of the claimant-plaintiff. It is doubtful that the use of arbitration in this instance has materially reduced the expense of litigating the case, as the parties have conducted the matter in essentially the same manner as a court trial. The costs of arbitration and the arbitration location in this instance are basically added expenses. For this reason the arbitrator will not change the agreement of the parties, and the costs of arbitration and the arbitration location will be divided equally between the parties.

III. AWARD

The determination of the arbitrator is as follows:

1. Claimant-plaintiff Karen Pacheco shall have no recovery against the respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., Timothy R. Collins, M.D., and Colorado Permanente Medical Group, P.C.

2. Respondent-defendants Lawrence S. Allen, M.D., Michael K. Miller, M.D., Timothy R. Collins, M.D., and

Colorado Permanente Medical Group, P.C. shall have recovery against claimant-plaintiff Karen Pacheco for those costs normally allowed in a civil action in the State of Colorado.

3. The costs of this arbitration in the amount of $7,757.50 and the costs of the arbitration location shall be paid in two equal shares by the parties in accordance with their agreement.

Dated March 22, 2000.

/s/ Robert A. Behrman
ROBERT A. BEHRMAN
Arbitrator

APPENDIX E

DISTRICT COURT, CITY AND COUNTY OF DENVER
STATE OF COLORADO
Courtroom 7

[Filed Dec. 11, 1998]

Case No. 98CV2340

KAREN PACHECO,

Plaintiff,

v.

SAINT JOSEPH HOSPITAL, INC., LAWRENCE S. ALLEN, M.D., JOHN C. FARRIN, M.D., SCOTT H. KUBOWICZ, M.D., MICHAEL K. MILLER, M.D. and PETER D. RILEY, M.D.,

Defendants.

ORDER GRANTING MOTION TO COMPEL ARBITRATION

In this medical malpractice case, plaintiff sues for the wrongful death of her husband, Mark Pacheco. Defendant St. Joseph Hospital, Inc. has already been dismissed on motion. The remaining individual defendants are doctors who allegedly provided care to Mark Pacheco. Mr. Pacheco had medical coverage through Kaiser Foundation Health Plan of Colorado ("Kaiser"). Pursuant to a clause in the medical and hospital service agreement between Mr. Pacheco and Kaiser, the individual defendants now move to dismiss this action or compel arbitration.

The agreement to arbitrate is set forth in defendants' motion and applies by its terms to "any claim of medical malpractice" asserted by "a Member or by a Member's heir or personal representative or by a person claiming that a duty to him or her arises from a Member's relationship with"

(Kaiser). The form of the arbitration agreement does not comply with C.R.S. § 13-64-403(4) of the Colorado Health Care Availability Act ("HCAA") because it lacks the notice in bold-faced type required by that section. In *Colorado Permanente Medical Group, P.C. v. Evans*, 926 P.2d 1218, 1226 (Colo. 1996), the Colorado Supreme Court held that the Kaiser arbitration provision was unenforceable due to failure to comply with the HCAA. Defendants argue that the Federal Arbitration Act ("FAA") preempts the HCAA in this regard, a question explicitly not reached by the Supreme Court in *Evans*. Defendants cite three orders from state district court judges and one from a federal district court judge holding that this very arbitration clause is enforceable because the FAA preempts the limits on arbitration clauses contained in the HCAA. These cases follow from the supremacy of the FAA declared by the United States Supreme Court in *Doctor's Associates v. Casarotto*, 517 U.S. __, 134 L.Ed.2d 902, 116 S.Ct. 1652 (1996).

In response, plaintiff urges four reasons why she should not be compelled to arbitrate her wrongful death claim. First, plaintiff argues that she was not a party to the arbitration agreement and therefore is not bound by it. However, I find that the language of the arbitration agreement clearly shows the intention of the parties that claims by people in plaintiff's position were intended to be governed. The agreement governs claims by an heir or personal representative or by a person claiming that a duty to him or her arises from Mr. Pacheco's relationship with Kaiser. Plaintiff's argument that she is technically not an "heir" as defined in the Wrongful Death Act is unpersuasive; interpreting the words of the agreement in accord with their plain and ordinary meaning mandates that the word "heir" be read to include a surviving spouse. As a matter of law, plaintiff is bound by the arbitration clause.

Plaintiff next argues that her complaint operates as a rescission of the arbitration clause in Mr. Pacheco's agreement with Kaiser. Nothing in the agreement suggests that filing a complaint could operate as a rescission. Further, plaintiff has failed to establish that any such rescission would be timely in relation to when Mr. Pacheco became bound by the agreement.

Plaintiff's most creative argument for escaping the effect of the arbitration clause is based on the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The McCarran-Ferguson Act provides that no federal law may preempt a state law enacted for the purpose of regulating the business of insurance. Plaintiff argues that section 403 of the HCAA regulates the business of insurance and therefore cannot be preempted by the FAA. I disagree. The HCAA is, by its terms, a tort reform statute. Although 13-64-403(1) governs the activities of medical malpractice insurers, the section generally applies to "health care providers," not to insurance companies. The United States Supreme Court has established a three factor test for determining whether a state law regulates the business of insuranee. *Union Labor life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). The subject provision of the HCAA manifestly does not meet the third part of the test because the practice regulated by the statute is not limited to entities within the insurance industry; rather, the statute applies to "health care providers." Kaiser may be an insurer as well as a health care provider, but the statute applies to all health care providers, not just health maintenance organizations; thus, the statute does not regulate the business of insurance. Therefore, I conclude that the McCarran-Ferguson Act does not apply and that the FAA does preempt the limitations on arbitration agreements contained in the HCAA.

Finally, plaintiff argues that the Kaiser agreement is, by its terms, subject to Colorado law and not to the Federal Arbitration Act. In support of this argument, plaintiff points

to sections of the agreement which refer to the Colorado Uniform Arbitration Act and Colorado law as being controlling. The agreement does not include a reference to the FAA. That argument is specifically refuted by the numerous federal cases upholding the supremacy of the FAA which are cited in defendants' reply brief. The FAA would be of little consequence if it applied only in situation where the parties' contract specifically referenced it.

Having rejected each of plaintiff's theories that she is not subject to the arbitration clause, I grant defendants' motion to compel arbitration. Further proceedings in this action are stayed pending completion of the arbitration of plaintiff's claims. The jury trial scheduled for March 15, 1999 is vacated.

Plaintiff's motion to require compliance with Rule 16 and 26 is deemed moot. Plaintiff's motion for reconsideration of my order dismissing her claims against St. Joseph Hospital, Inc. is denied.

Dated this 11th day of December, 1998.

BY THE COURT

/s/ Joseph E. Meyer
JOSEPH E. MEYER III
District Court Judge

cc: Montoya
Cohen

APPENDIX F

COLORADO SUPREME COURT
MONDAY, JUNE 30, 2003

Case No. 01SC744

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, Colorado 80203
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 00CA1624

LAWRENCE S. ALLEN, M.D.; MICHAEL K. MILLER, M.D.;
TIMOTHY R. COLLINS, M.D.; and
COLORADO PERMANENTE MEDICAL GROUP, P.C.,
Petitioners,

v.

KAREN PACHECO,
Respondent.

PETITIONS FOR REHEARING

Petition for Rehearing DENIED. EN BANC.

JUSTICE KOURLIS and JUSTICE BENDER would grant the Petition.

APPENDIX G

FEDERAL AND STATE STATUTES

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

15 U.S.C. § 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as

amended [15 U.S.C.A. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

(Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.)

Colo. Rev. Stat. § 13-64-403

(1) It is the intent of the general assembly that an arbitration agreement be a voluntary agreement between a patient and a health care provider and no medical malpractice insurer shall require a health care provider to utilize arbitration agreements as a condition of providing medical malpractice insurance to such health care provider. Making the use of arbitration agreements a condition to the provision of medical malpractice insurance shall constitute an unfair insurance practice and shall be subject to the provisions, remedies, and penalties prescribed in part 11 of article 3 of title 10, C.R.S.

(1.5) Exemplary damages may be awarded in any arbitration proceeding held pursuant to this section in accordance with section 13-21-102(1) to (3) and (6). Any award of exemplary damages in a proceeding held pursuant to this section may be modified by the district court upon petition to the district court alleging that the award of such damages was either excessive or inadequate.

(2) Any agreement for the provision of medical services which contains a provision for binding arbitration of any dispute as to professional negligence of a health care provider that conforms to the provisions of this section shall not be deemed contrary to the public policy of this state, except as provided in subsection (10) of this section.

(3) Any such agreement shall have the following statement set forth as part of the agreement: "It is understood that any claim of medical malpractice, including any claim that medical services were unnecessary or unauthorized or were

improperly, negligently, or incompetently rendered or omitted, will be determined by submission to binding arbitration in accordance with the provisions of the "Uniform Arbitration Act of 1975", part 2 of article 22 of title 13, Colorado Revised Statutes, and not by a lawsuit or resort to court process except as Colorado law provides for judicial review of arbitration proceedings. The patient has the right to seek legal counsel concerning this agreement, and has the right to rescind this agreement by written notice to the physician within ninety days after the agreement has been signed and executed by both parties unless said agreement was signed in contemplation of the patient being hospitalized, in which case the agreement may be rescinded by written notice to the physician within ninety days after release or discharge from the hospital or other health care institution. Both parties to this agreement, by entering into it, have agreed to the use of binding arbitration in lieu of having any such dispute decided in a court of law before a jury."

(4) Immediately preceding the signature lines for such an agreement, the following notice shall be printed in at least ten-point, bold-faced type:

NOTE: BY SIGNING THIS AGREEMENT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL BINDING ARBITRATION RATHER THAN BY A JURY OR COURT TRIAL.

YOU HAVE THE RIGHT TO SEEK LEGAL COUNSEL AND YOU HAVE THE RIGHT TO RESCIND THIS AGREEMENT WITHIN NINETY DAYS FROM THE DATE OF SIGNATURE BY BOTH PARTIES UNLESS THE AGREEMENT WAS SIGNED IN CONTEMPLATION OF HOSPITALIZATION IN WHICH CASE YOU HAVE NINETY DAYS AFTER DISCHARGE OR RELEASE FROM THE HOSPITAL TO RESCIND THE AGREEMENT.

NO HEALTH CARE PROVIDER SHALL WITHHOLD THE PROVISION OF EMERGENCY MEDICAL SERVICES TO ANY PERSON BECAUSE OF THAT PERSON'S FAILURE OR REFUSAL TO SIGN AN AGREEMENT CONTAINING A PROVISION FOR BINDING ARBITRATION OF ANY DISPUTE ARISING AS TO PROFESSIONAL NEGLIGENCE OF THE PROVIDER.

NO HEALTH CARE PROVIDER SHALL REFUSE TO PROVIDE MEDICAL CARE SERVICES TO ANY PATIENT SOLELY BECAUSE SUCH PATIENT REFUSED TO SIGN SUCH AN AGREEMENT OR EXERCISED THE NINETY-DAY RIGHT OF RESCISSION.

(5) Once signed, the agreement shall govern all subsequent provision of medical services for which the agreement was signed until or unless rescinded by written notice. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor. Where the agreement is one for medical services to a minor, it shall not be subject to disaffirmation by the minor if signed by the minor's parent or legal guardian.

(6) The patient shall be provided with a written copy of any agreement subject to the provisions of this section at the time that it is signed by the parties.

(7) No health care provider shall refuse to provide medical care services to any patient solely because such patient refused to sign such an agreement or exercised the ninety-day right of rescission.

(8) No health care provider shall withhold the provision of emergency medical services to any person because of that person's failure or refusal to sign an agreement containing a provision for binding arbitration of any dispute arising as to professional negligence of the provider.

(9) If a health care provider refuses to provide medical care services to any patient in violation of subsection (7) of this

section or withholds the provision of emergency medical services to any person in violation of subsection (8) of this section or fails to comply with the requirements of subsection (3) or (4) or both of this section, such refusal or withholding of services shall constitute unprofessional conduct as such term is used under the relevant licensing statute governing that particular care provider, and the appropriate authority which conducts disciplinary proceedings relating to such health care provider shall consider and take appropriate disciplinary action against such health care provider as provided under the relevant licensing statute.

(10) Even where it complies with the provisions of this section, such an agreement may nevertheless be declared invalid by a court if it is shown by clear and convincing evidence that:

(a) The agreement failed to meet the standards for such agreements as specified in this section; or

(b) The execution of the agreement was induced by fraud; or

(c) The patient executed the agreement as a direct result of the willful or negligent disregard of the patient's right to refrain from such execution; or

(d) The patient executing the agreement was not able to communicate effectively in spoken and written English, unless the agreement is written in his native language.

(11) No such agreement may be submitted to a patient for approval when the patient's condition prevents the patient from making a rational decision whether or not to execute such an agreement.

(12) For the purposes of this section:

(a)(I) "Health care provider" means any person licensed or certified by the state of Colorado to deliver health care and any clinic, health dispensary, or health facility

licensed by the state of Colorado. The term includes any professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state.

(II)(A) Nothing in this paragraph (a) shall be construed to permit a professional service corporation, as described in section 12-36-134, C.R.S., to practice medicine.

(B) Nothing in this paragraph (a) shall be construed to otherwise create an exception to the corporate practice of medicine doctrine.

(b) "Professional negligence" means a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of personal injury or wrongful death, as long as such services are within the scope of services for which the provider is licensed.

Added by Laws 1988, S.B.143, § 1. Amended by Laws 1989, H.B.1294, § 3, eff. July 1, 1989; Laws 1995, H.B.95-1090, § 7, eff. March 9, 1995; Laws 2003, Ch. 240, § 5, eff. July 1, 2003.